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Supreme Court, U.S.
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No. 01-1831

IN THE

Supreme Court of the United States

DOREL JUVENILE GROUP, INC.,

Petitioner,

v.

LOUIS M. KOHUS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *ii* of the Petition for a Writ of Certiorari, and there are no amendments to that statement.

TABLE OF CONTENTS

	Page
Statement Pursuant to Rule 29.6	i
Table of Contents	ii
Table of Cited Authorities	iii
Introduction	1
1. Respondent has both accurately and inaccurately characterized the issue for review.	1
2. Respondent has attempted to eliminate the split of authority among the circuits by narrowing the issue unduly, and by mischaracterizing and disregarding the case law.	2
3. Respondent attempts to eliminate the circuit split by assuming that the Federal Circuit's interpretation of the statute is correct. *Crawford Fitting*, however, binds trial courts to awarding only those costs enumerated by the statute; it does not define "exemplification."	5
4. The Federal Circuit's decision exacerbates the uncertainty among litigants and courts and an interpretation of the word exemplification by this Court will not be dicta.	7
Conclusion	9

TABLE OF CITED AUTHORITIES

Page

Cases:

Arcadian Fertilizer, L.P. v. MPW Indus. Servs., Inc., 249 F.3d 1293 (11th Cir. 2001) 4, 7

Cefalu v. Village of Elk Grove, 211 F.3d 416 (7th Cir. 2000) 4, 7

Cobb v. Time, Inc., No. 3:94-0836, 1999 U.S. Dist. LEXIS 22992 (M.D. Tenn. Dec. 10, 1999) 3

Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987) ..... *passim*

Deaton v. Dreis & Krump Mfg. Co., 134 F.R.D. 219 (N.D. Ohio 1991) 3

Denny v. Westfield State Coll., 880 F.2d 1465 (1st Cir. 1989) 3, 5

EEOC v. Kenosha Unified Sch. Dist. No. 1, 620 F.2d 1220 (7th Cir. 1980) 4

Goodwall Constr. Co. v Beers Constr. Co., 824 F. Supp. 1044 (N.D. Ga. 1992) 3, 4, 7

Maxwell v. Hapag-Lloyd Aktiengesellschaft, 862 F.2d 767 (9th Cir. 1988) 3, 4

Romero v. City of Pomona, 883 F.2d 1418 (9th Cir. 1989) 3, 4, 5, 7

Tilton v. Capital Cities/ABC, Inc., 115 F.3d 1471 (10th Cir. 1997) 3

U.S. Indus., Inc. v. Touche Ross & Co., 854 F.2d 1223 (10th Cir. 1988) 3

Cited Authorities

Page

Statute:

28 U.S.C. § 1920 (1994) ..... *passim*

Miscellaneous Authority:

Black's Law Dictionary (7th ed. 1999) 6

INTRODUCTION

Petitioner has asked the Court to grant certiorari in this matter because the issue presented — namely, the scope of recoverable costs for exemplification under 28 U.S.C. § 1920(4) — falls within the category of cases that are compelling, as that term is defined in Rule 10 of the Rules of the Supreme Court of the United States. In every case that proceeds to judgment in the federal courts, litigants submit, and courts consider, a bill of costs. There is no uniformity, however, concerning the scope of costs recoverable as costs for "exemplification." Thus, the clarity of the relevant statute, 28 U.S.C. § 1920(4), is of paramount importance to both litigants and courts. Petitioner has not, as Respondent has charged, "manufactured" an issue for consideration by this Court.

Respondent has challenged the Petition on the basis that there is no split among the circuits. Respondent arrives at this conclusion by narrowing and inaccurately characterizing the issue presented, by mischaracterizing and even disregarding the case law, and by presupposing what Respondent hopes this Court will ultimately conclude, namely, that the term exemplification cannot be understood to encompass anything more than "official transcripts." This is precisely the conclusion of the Federal Circuit, and precisely the issue that would benefit greatly from this Court's attention.

1. Respondent has both accurately and inaccurately characterized the issue for review.

Respondent has accurately characterized the issue presented as the scope of recoverable costs for exemplification under 28 U.S.C. § 1920(4). *See* Br. in Opp'n at 1, 19. Respondent also, however, variously characterizes the issue as: "how comparable [demonstrative] evidence must be to the enumerated categories in section 1920 to be taxed" (*id.* at 2); whether costs

for "models" may be taxed; or whether computer animation may be taxed (*id.* at 15). Respondent further narrows the issue by arguing that this case is not appropriate for review because no other cases consider "whether an animated video — that was prepared solely as an exhibit to an expert report; that was never used at trial; that was never admitted into evidence; and that was never cited to or relied upon by the district court — can be taxed as fee for exemplification" (*id.* at 15).

The question presented is, as Petitioner has said, the scope of recoverable costs for exemplification. The other issues presented by this case in particular will be resolved by this Court's guidance as to the meaning of the word exemplification.

2. Respondent has attempted to eliminate the split of authority among the circuits by narrowing the issue unduly, and by mischaracterizing and disregarding the case law.

Respondent argues that there is no split in authority among the circuits because, *inter alia*, Petitioner has identified no cases that resemble this one factually, as defined by the several points outlined above (i.e., the exhibit was prepared as an exhibit for an expert report; it was never used at trial; it was never admitted into evidence, etc.). Only by narrowing the issue unduly can Respondent eliminate the considerable split among the circuits. This narrowing disregards the fact that cases are unique in their facts and procedural history and ignores important and extensive case law construing Section § 1920(4).

Respondent's misstatements concerning the case law on this subject are several. First, Respondent contends, "*All* of the other cases referenced by [Petitioner] in its brief [save Eleventh Circuit and Seventh Circuit cases] were decided

before this Court's decision in *Crawford Fitting*" (Br. in Opp'n at 2) (emphasis added).[1] This statement is simply untrue. *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987), was decided in 1987. Petitioner cites many cases, in addition to those from the Seventh and Eleventh Circuits, decided after 1987. *See Tilton v. Capital Cities/ABC, Inc.*, 115 F.3d 1471, 1476 (10th Cir. 1997); *Romero v. City of Pomona*, 883 F.2d 1418, 1427 (9th Cir. 1989); *Denny v. Westfield State Coll.*, 880 F.2d 1465, 1472 (1st Cir. 1989); *Maxwell v. Hapag-Lloyd Aktiengesellschaft*, 862 F.2d 767, 770 (9th Cir. 1988); *U.S. Indus., Inc. v. Touche Ross & Co.*, 854 F.2d 1223, 1248 (10th Cir. 1988)[2] ; *Goodwall Constr. Co. v. Beers Constr. Co.*, 824 F. Supp. 1044, 1061-64 (N.D. Ga. 1992); *Deaton v. Dreis & Krump Mfg. Co.*, 134 F.R.D. 219, 224 (N.D. Ohio 1991); *Cobb v. Time, Inc.*, No. 3:94-0836, 1999 U.S. Dist. LEXIS 22992, at *5-6 (M.D. Tenn. Dec. 10, 1999).

Respondent later qualifies this statement considerably, contending that,

> [T]he Second, Fifth, Ninth, and Tenth circuit decisions cited by Cosco in its petition were either *decided prior to this Court's 1987 decision in Crawford Fitting — or fail to address the impact of Crawford Fitting* — and, thus, rely on the now-discredited assumption that a district court possesses inherent authority to award costs in addition to those specifically enumerated by statute.

Br. in Opp'n at 16 (emphasis in original). This statement is also untrue. Petitioner relies on *Maxwell*, a case decided after

1. For context, the quotation continues, ". . . and still adhered to the now discredited belief that a district court, in exercise of its general equitable powers, could award costs beyond those specifically enumerated by statute" (Br. in Opp'n at 2).

2. Petitioner incorrectly cited the year of this decision as 1998 in its Petition.

Crawford Fitting. In *Maxwell*, the Ninth Circuit concluded that, after considering arguments from both parties as to the significance of *Crawford Fitting*, "the common meaning of the phrase 'exemplification and copies of papers' may under certain circumstances encompass illustrative materials *if* '*necessarily* obtained for use in the case. . . .'" 862 F.2d at 770 (emphasis in original). In *Romero*, also decided after *Crawford Fitting*, the Ninth Circuit opines that *Crawford Fitting* "fatally undermines" Seventh Circuit law[3] relying on the court's equitable power to tax costs "'beyond mere physical production of court materials,'" and concludes that Section 1920(4) cannot be read so broadly as to allow recovery of expert research expenses as exemplification costs. 883 F.2d at 1428.

In addition, in an effort to minimize the conflict among the courts, Respondent also eliminates consideration of other, important cases that illustrate the post-*Crawford Fitting* conflict. Both the Seventh Circuit and the Eleventh Circuit cases cited by Petitioner discuss the implications of *Crawford Fitting*. *See Arcadian Fertilizer, L.P. v. MPW Indus. Servs., Inc.*, 249 F.3d 1293, 1296 (11th Cir. 2001); *Cefalu v. Village of Elk Grove*, 211 F.3d 416, 427-28 (7th Cir. 2000). Nonetheless, Respondent focuses on the Second, Fifth, Ninth, and Tenth Circuit cases. Respondent has also overlooked a district court opinion discussing in detail the implications of *Crawford Fitting* on the prevailing rule of the Fifth Circuit (*Goodwall Constr.*, 824 F. Supp. at 1062-64), has ignored the conflict created by the Federal Circuit concerning Federal Circuit law and Sixth Circuit law in the present case, and simply disregards cases from the Tenth Circuit decided after *Crawford Fitting*. Respondent has thus narrowed drastically the category of cases it believes relevant for consideration

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3. Citing *EEOC v. Kenosha Unified Sch. Dist. No. 1*, 620 F.2d 1220 (7th Cir. 1980).

by this Court. Even having done so, Respondent has failed to articulate an accurate statement of the extensive authority cited by the Petitioner.[4]

In short, it is simply not accurate either that "Cosco has identified no split among the circuit courts that is relevant to the issues . . ." or that "none of the other circuit courts have had the opportunity to address the issue since *Crawford Fitting*." Br. in Opp'n at 19. Nor is it compelling that Respondent has discounted or disregarded cases from the Seventh, Ninth, Tenth, and Eleventh Circuits. There is a wide range of views concerning the scope of items taxable as costs for exemplification, and courts and litigants would benefit greatly from review of this issue by the Court.

3. Respondent attempts to eliminate the circuit split by assuming that the Federal Circuit's interpretation of the statute is correct. *Crawford Fitting*, however, binds trial courts to awarding only those costs enumerated by the statute; it does not define "exemplification."

Respondent also attempts to minimize the split among the circuits by presupposing that the Federal Circuit's interpretation of the statute is correct. However, that the

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4. Respondent also maintains that "many of the decisions cited by Cosco have nothing whatsoever to do with section 1920(4), the taxation of video models or the general taxation of demonstrative evidence." Br. in Opp'n at 16-17. This statement is also untrue. The two cases cited for this proposition by Respondent explicitly address section 1920(4). *See Denny*, 880 F.2d at 1467-68 (also discussing *Crawford Fitting*); *Romero*, 883 F.2d at 1428 (same). Moreover, to the extent that Respondent seeks to narrow the import of *Romero* based on the fact that it discusses whether expert research expenses associated with the preparation of trial exhibits may be taxed, rather than the exhibits themselves, it is improper to do so. *Romero*, as other cases, illustrates the wide range of costs that have been considered as exemplification costs.

Federal Circuit correctly concluded that no costs are recoverable for a video animation under the statute is not a foregone conclusion.

In *Crawford Fitting*, the Supreme Court held that only those costs specifically enumerated in 28 U.S.C. § 1920 are permissibly taxed as costs by the prevailing party. 482 U.S. at 440. There is no disagreement between the parties on this point. This holding does not, however, resolve the meaning of the terms employed in the statute. Specifically, this Court has not determined what costs are properly taxed as costs for "exemplification."

Respondent's contention that *Crawford Fitting* resolves the present dispute rests on the assumption that the Federal Circuit is correct in its conclusion that exemplification is properly understood as nothing more than an "official transcript . . . authenticated or certified as a true copy." Black's Law Dictionary 593 (7th ed. 1999). Petitioner is contesting exactly that assumption. Respondent characterizes the "remaining" split regarding exemplification as one of "how comparable [demonstrative] evidence must be to the enumerated categories in section 1920 to be taxed." Br. in Opp'n at 2. This statement does not accurately characterize the issue before the Court, and indeed highlights the problem with which courts are faced. If *Crawford Fitting* is to be followed, then it is improper for the courts to base a decision of what is taxable as "exemplification" costs on whether such evidence is "comparable" to the enumerated categories of section 1920. Exemplification must be defined.

Further, the fact that some courts have not relied on *Crawford Fitting* in assessing costs for "exemplification" disproves what Respondent seeks to prove — namely, that *Crawford Fitting* resolved the issue of what costs are recoverable as costs for "exemplification." *Crawford Fitting*

did not define the term and does not provide guidance to the courts on this point. Nevertheless, Respondent has overstated its case. *Crawford Fitting* has been recognized by many courts as relevant to their determination of what costs are recoverable as exemplification costs. *See Arcadian Fertilizer*, 249 F.3d at 1296; *Cefalu*, 211 F.3d at 427-28; *Romero*, 883 F.2d at 1428; *Maxwell*, 862 F.2d at 770; *Goodwall Constr.*, 824 F. Supp. at 1061.

Crawford Fitting did not resolve the issue before the Court, and the issue left open by *Crawford Fitting* continues to be a subject of widespread dispute, both in cases that specifically mention *Crawford Fitting* and in those that do not.

4. The Federal Circuit's decision exacerbates the uncertainty among litigants and courts and an interpretation of the word exemplification by this Court will not be dicta.

Respondent's characterization of the Federal Circuit's opinion demonstrates how the Federal Circuit has exacerbated the uncertainty surrounding taxation of exemplification costs. Respondent notes that the Federal Circuit first determined that the trial court had no discretion to award costs for the video animation, reasoning that Congress could have included costs for "demonstrative evidence" in the statute if it had intended the statute to be read more broadly. Respondent then characterizes the Federal Circuit's consideration of the law of the Sixth Circuit as an "even if" argument. That is, *even if* such costs were allowable, the Sixth Circuit would not allow them. Br. in Opp'n at 11.

Thus, not only is there a conflict among the circuits regarding the scope of the term exemplification, there exists in patent cases the additional uncertainty of whether the

Federal Circuit will apply its interpretation of the statute, or follow that of the regional circuit it is bound to apply. District court judges from the various jurisdictions will have no means for determining whether the Federal Circuit will uphold or strike down taxation of exemplification costs according to the law of the circuit, and will have no assurance that the Federal Circuit will exercise care to interpret the law in accordance with the relevant law of the circuit.

Finally, Respondent spends a significant portion of his opposition brief outlining for the Court the sequence of events that led to the taxing of Petitioner's video animation model as costs, and arguing, without citation to authority, that the Court's ruling would be dicta because it is possible to affirm the Federal Circuit's opinion on other bases. Stated otherwise, Respondent seems to be arguing that because the Federal Circuit could have reversed the trial court on alternative grounds, this Court should affirm the Federal Circuit's reversal. This argument is unpersuasive given the Federal Circuit's complete reliance on statutory analysis.

Respondent asks this Court to affirm the Federal Circuit's reversal on bases never considered in the Federal Circuit's opinion. The only "alternative basis" even mentioned by the Federal Circuit was the fact that Petitioner did not originally classify its video model as an exemplification cost. Br. in Opp'n at 13. The fact that costs could have been denied on other grounds does not alter the fact that the Federal Circuit reversed the trial court's award of costs based on its interpretation of the word "exemplification," an interpretation that is disputed throughout the circuits.[5]

5. It appears that the Respondent is asking the Court to deny certiorari based upon a determination, not made by the Federal Circuit, that the trial court abused its discretion in awarding costs to Petitioner, rather than committed legal error. Issues such as the designation of the video model as "other costs" and the fact that the (Cont'd)

In short, even if the Federal Circuit could have reversed or affirmed the trial court on other bases, it did not. Therefore, this case falls within those classes of cases that qualify as "compelling" pursuant to Rule 10 of the Rules of the Supreme Court of the United States.

CONCLUSION

Respondent's Brief in Opposition mischaracterizes the case law and reframes the issue in an attempt to eliminate the very real split among the courts concerning what costs are recoverable as exemplification costs. The Federal Circuit's interpretation of the statute, however, is anything but a decided issue of law. Rather, there is no certainty in any circuit on this issue. For all of the above reasons, as well as those set forth in the Petition, Petitioner respectfully requests that certiorari be granted.

Respectfully submitted,

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(Cont'd)

exhibit was never used because Petitioner was granted summary judgment are issues related to procedural compliance with the statute and the determination of whether the video model was "necessarily obtained for use in the case," matters within the discretion of the trial court. 28 U.S.C. § 1920.